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## MARRIAGES OF CONVENIENCE: INTERNATIONAL MARRIAGE BROKERS, “MAIL-ORDER BRIDES,” AND DOMESTIC SERVITUDE

*Suzanne H. Jackson\**

### I. INTRODUCTION

OVER the last twenty-five years, as international marriage brokers (“IMBs”), informally known as “mail-order bride” companies, have become more numerous and visible, they have also become more controversial. When the marriages resulting from their efforts explode into violence and homicide, the tragedies seem depressingly predictable byproducts of sexist and racist marketing of the women as cheap, disposable commodities, exacerbated by the women’s vulnerability due to social and language isolation, fragile immigration status, and low earning power. Recently-enacted federal legislation now requires IMBs to conduct simple background checks on U.S. clients (the men)<sup>1</sup> and disclose the results to the foreign recruits (the women). IMBs may not release a woman’s contact information until she has reviewed the background check results and returned a signed document confirming her consent.

Brokers have challenged these rules in two federal courts, claiming that the new law violates their constitutional rights to free speech and equal protection. Advocates arguing that the law’s restrictions advance legitimate governmental interests have described congressional intent as the prevention of domestic violence against immigrant women. Viewed from a Thirteenth Amendment perspective, however, the legislation also combats a modern form of involuntary

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1. IMBs, as an industry, offer images of women for perusal by men. In eight years, I found only two agencies purporting to offer only men’s images for women’s perusal; one was satirical, the other disappeared within a month. See Suzanne H. Jackson, *To Honor and Obey: Trafficking in “Mail-Order Brides,”* 70 GEO. WASH. L. REV. 475, 495 (2002). See also Gary G. Bala, *Welcome to the Year 2007 Issue*, 4 INT’L VISA TRAVELER 1 (2007), <http://www.usaimmigrationattorney.com/images/NEWSLETTER2007.pdf> (newsletter “designed for American bachelor gentlemen who seek an international fiancée and bride”); Press Release, Russian Brides Cyber Guide, Mail Order Brides Petition Against the Legislation that Should Protect Them (Aug. 22, 2003), [http://www.womenrussia.com/press/22\\_08\\_2003.htm](http://www.womenrussia.com/press/22_08_2003.htm) (promoting a petition signed by Russian mail order brides against proposed legislation to regulate international matchmaking agencies).

servitude, one taking cover under the cloak of marriage. Regulating international marriage brokers is an important measure in an ongoing fight against an old enemy, one that would be very familiar to enslaved and indentured women in the seventeenth, eighteenth, and nineteenth centuries: extortion of sexual and domestic labor through threats, intimidation, coercion, and physical force. Failure to recognize and punish involuntary servitude occurring within the domestic sphere particularly injures women, denying them equal protection of the law.

## II. BACKGROUND

Slavery, even in the twenty-first century, is far from extinct. Expert Kevin Bales estimated conservatively that approximately thirty million people are enslaved worldwide, most trapped in debt bondage in Southeast Asia.<sup>2</sup> Males and females endure different burdens in slavery: men and boys are set to hard physical labor, while women and girls are most often used as domestic servants and in prostitution.<sup>3</sup> Bales calls them “disposable people,” reflecting a harsh new global reality: once provided some minimal level of care, enslaved people are now treated as an inexhaustible supply of cheap human fodder, forced to work in dangerous and debilitating conditions to extract profits as quickly as possible, with no regard for long-term survival.<sup>4</sup>

Reflecting this transformation from capital investment to cheap production input, lawful ownership over the enslaved is no longer necessary; contractual arrangements suffice.<sup>5</sup> To get a promising job, a prospective employee will agree to incur a debt, whether for transportation costs, room and board, special equipment, training, or uniforms, that must be paid back before the employee is free to leave work.<sup>6</sup> Contracts may even require forfeiture of all wages paid if the full term of work is not completed.<sup>7</sup> Employers confiscate immigration and

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2. KEVIN BALES, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY 8-9 (1999).

3. The youngest girls (and some young boys) toil as domestic servants. *See, e.g., id.* at 4-5; U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 38 (2006) [hereinafter 2006 TRAFFICKING REPORT], available at <http://www.state.gov/documents/organization/66086.pdf>; Press Release, U.S. Immigration & Customs Enforcement, Two Egyptian Nationals Plead Guilty to Holding Girl as Domestic Slave (June 30, 2006), [http://www.ice.gov/pi/news/newsreleases/articles/060630\\_santaana.htm](http://www.ice.gov/pi/news/newsreleases/articles/060630_santaana.htm).

4. BALES, *supra* note 2, at 14-29. A parallel transformation occurred in the southern United States after the enactment of the Thirteenth Amendment. Southern legislators opposing the Amendment pointed to the hardships of “wage slavery,” claiming that slave owners cared for their property from cradle to grave, whether or not work was available or someone was able to work, while “northern employers simply fired employees when they were no longer of use.” Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 486 (1989).

5. BALES, *supra* note 2, at 4-5.

6. *See id.* at 126-29. For a general history of indentured servitude, see THE CAMBRIDGE SURVEY OF WORLD MIGRATION (Robin Cohen ed., 1995). *See also* United States v. Bibbs, 564 F.2d 1165, 1166-67 (5th Cir. 1977) (employer-set pricing charged for necessities used to hold migrant farm workers in involuntary servitude).

7. *Bibbs*, 564 F.2d at 1167.

identity documents, and use threats of deportation, arrest, or death to isolate and intimidate workers.<sup>8</sup>

Another contractual arrangement implicated in modern slavery is the contract of marriage. The International Organization for Migration and the U.S. State Department found that traffickers seeking women and girls for prostitution often use marriage offers to lure them from safety across international borders.<sup>9</sup> In China, decades of abortion and infanticide favoring male children has left fewer women available for marriage, impelling “bride trafficking” where men purchase women and girls outright for purposes of forced marriage.<sup>10</sup> In the United States, one small study of forty women in prostitution found that almost thirty percent of the U.S.-born women were prostituted by husbands or boyfriends.<sup>11</sup> Across the world, husbands use physical abuse to extract sexual and domestic services from their wives, even prostituting them for profit or selling them outright to brothels or agents.<sup>12</sup>

Brokers conduct some of this marriage-based slave trade in public; for example, one Taiwanese publication recently advertised nearly thirty Vietnamese women for sale as brides at a price of about \$6,000 apiece.<sup>13</sup> Most such trafficking is conducted covertly, however, through large or small criminal organizations, or under cover of legitimate international businesses like IMBs.<sup>14</sup>

U.S. embassies, trafficking experts, and immigration officials worldwide report that IMBs provide legal cover for criminal trafficking in women.<sup>15</sup> A U.S.-based non-profit organization, Global Survival Network, found that most matchmaking agencies advertising Russian women for marriage concealed sex

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8. See BALES, *supra* note 2, at 128.

9. *Prostitution in Asia Increasingly Involves Trafficking*, TRAFFICKING IN MIGRANTS Q. BULL., June 1997, at 2, available at <http://www.old.iom.int/documents/publication/en/tm15.pdf>; 2006 TRAFFICKING REPORT, *supra* note 3, at 14, 20, 55, 258. See also Mohamed Y. Mattar, *Trafficking in Persons, Especially Women and Children, in Countries of the Middle East: The Scope of the Problem and the Appropriate Legislative Responses*, 26 FORDHAM INT'L L.J. 721, 729-34 (2003).

10. 2006 TRAFFICKING REPORT, *supra* note 3, at 20. In some Chinese villages, trafficking reportedly accounts for 30%–90% of marriages.

11. See JANICE G. RAYMOND & DONNA M. HUGHES, COALITION AGAINST TRAFFICKING IN WOMEN, SEX TRAFFICKING OF WOMEN IN THE UNITED STATES 10 (2001), available at [http://www.uri.edu/artsci/wms/hughes/sex\\_traff\\_us.pdf](http://www.uri.edu/artsci/wms/hughes/sex_traff_us.pdf).

12. *Prostitution in Asia Increasingly Involves Trafficking*, *supra* note 9, at [2]. See also 2006 TRAFFICKING REPORT, *supra* note 3, at 14-15 (providing generic facts based on true cases and meant to “represent common circumstances in which trafficking occurs”); Jackson, *supra* note 1, at 491.

13. 2006 TRAFFICKING REPORT, *supra* note 3, at 275.

14. *Human Trafficking: Mail-Order Bride Abuses: Hearings Before the Subcomm. on E. Asian & Pac. Affairs of the S. Foreign Relations Comm.*, 108th Cong. 4-6 (2004), available at <http://foreign.senate.gov/testimony/2004/HughesTestimony040713.pdf> (testimony of Donna Hughes, Professor of Women's Studies, Univ. of R.I.) [hereinafter Hughes Testimony].

15. 2006 TRAFFICKING REPORT, *supra* note 3, at 223; U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 50, 168 (2004) [hereinafter 2004 TRAFFICKING REPORT]; DONNA M. HUGHES, COALITION AGAINST TRAFFICKING IN WOMEN, PIMPS AND PREDATORS ON THE INTERNET: GLOBALIZING THE SEXUAL EXPLOITATION OF WOMEN AND CHILDREN 6, 42-43 (1999); NICOLE CONSTABLE, ROMANCE ON A GLOBAL STAGE 105 (2003); Hughes Testimony, *supra* note 14, at 5-6.

trafficking operations.<sup>16</sup> Women advertised to the public as interested in marriage may instead be sold into prostitution, forced marriage, slavery as domestic servants, or all of the above. A Central Intelligence Agency (“CIA”) study found U.S.-based marriage brokers advertising minors for marriage and failing to screen male clients for criminal records, allowing traffickers, pimps, or even murderers to gain access to unsuspecting women.<sup>17</sup> The study concluded that in cases where IMBs fail to disclose known facts about “the nature of the relationship being entered into or the criminal or abusive background of the client, the brokers should be liable as traffickers.”<sup>18</sup> A recent report on human trafficking by U.N. Special Rapporteur Sigma Huda noted the “high risk of trafficking of women and girls in cases where marriage-broking agencies are involved.” Huda found that “marriages instigated by the Internet and mail-order bride agencies often become forced marriages as women are not free to leave them” for economic, immigration, and social reasons, and out of fear, as “many men who seek marriage to women through these agencies have a history of violence against women.”<sup>19</sup> She described specific instances of marriage used to conceal human trafficking occurring in Israel, Mexico, Iraq, the United States, Moldova, Germany, Serbia, and Norway.<sup>20</sup>

The term “international marriage broker” obscures the gender, race, and class disparities permeating the market for “mail-order” marriage. IMBs’ paying customers are men from wealthy nations, who may spend thousands of dollars for access to images, addresses, tours, and introductions to women from much poorer nations. IMBs claim to sell matchmaking services: selectivity and taste in assembling a group of women, assistance in facilitating communications through interpreter and translator services, introductions on country tours, and even relationship advice. While IMBs sell services, the products they advertise are women from abroad. IMBs must present women as both attractive and available to justify their fees: men must believe that once they pay thousands of dollars to an agency, something more than rejections will result. Agencies describe the women as available and “waiting for you!”; some even guarantee marriage within a year of subscription to their services.<sup>21</sup>

Most IMBs specialize in women from a particular part of the world, and their advertising portrays women from that region as superior to all others, but simultaneously generic: all Asian women are shy, sweet, loving, and available; all Latinas are exotic, passionate, and feminine; all Russian women are elegant,

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16. *See* Videotape: Bought & Sold (Global Survival Network 1997) (on file with author).

17. AMY O’NEILL RICHARD, CENTER FOR THE STUDY OF INTELLIGENCE, INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME 27 (2000), available at <https://www.cia.gov/csi/monograph/women/trafficking.pdf>.

18. *Id.*

19. The Special Rapporteur, *Report of the Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children*, ¶ 56, U.N. Doc. A/HRC/4/23 (Jan. 24, 2007).

20. *Id.* ¶ 58.

21. *See* Jackson, *supra* note 1, at 494-95.

cultured, and educated.<sup>22</sup> All women marketed by IMBs are the same in one respect: in sharp contrast to U.S. women, portrayed as materialistic, career-obsessed, and aggressive,<sup>23</sup> every woman listed is traditional, home-oriented, loyal, and unselfish, putting husband and family first, with no needs or individuality of her own.<sup>24</sup> Although IMB advertising has tempered in tone since Congress began regulating the industry in 1996,<sup>25</sup> the underlying messages are the same: hundreds of thousands of women are available to almost any U.S. man so inclined.<sup>26</sup>

If any generalizations could apply to such a diverse group of women, consider that they are considering leaving their home countries, families, and friends to marry and live in a new environment. Women may be seeking greater professional opportunities in countries less beholden to traditional gender roles.<sup>27</sup> Yet, as an industry, IMBs market women for domestic servitude. IMBs package and promote gendered racism in the form of the fantasy wife of color, contentedly subordinate to husband and home, sexually available at any time, with no individuality or personality. This marketing perpetuates racist and sexist stereotypes, making immigrant women using IMBs attractive targets of people seeking someone to fit into a preconceived ideal, or seeking a servant rather than a spouse. One U.S. IMB customer referred to this as the “Ugly Male Syndrome,” when, in his words, men had “bit into the ‘Mail Order Maid You Can Have Sex With’ scenario.”<sup>28</sup>

IMB practices exacerbate inequalities between male clients and female recruits. Many companies require women to complete long, intrusive

22. See, e.g., Jackson, *supra* note 1, at 495; CONSTABLE, *supra* note 15, at 96; HUGHES, *supra* note 15, at 8-13; JANICE G. RAYMOND ET AL., A COMPARATIVE STUDY OF WOMEN TRAFFICKED IN THE MIGRATION PROCESS 27 (2003); Michelle J. Anderson, Note, *A License to Abuse*, 102 YALE L.J. 1401, 1408-09 & nn. 47-51 (1993).

23. See, e.g., Kristoffer A. Garin, A Foreign Affair: *On The Great Ukrainian Bride Hunt*, HARPER'S MAG., June 2006, at 69 (“‘These are not American women,’ our guide was telling us. ‘They do not care about your age, looks, or money.’”).

24. CONSTABLE, *supra* note 15, at 96-97; Latin American Introductions, [http://www.latinintro.com/base\\_pages/faq.asp](http://www.latinintro.com/base_pages/faq.asp) (last visited Mar. 3, 2007). See also Anderson, *supra* note 22, at 1408-09 & nn. 48-49; Barbara Ferry, *Web Dreams, Wedding Realities*, SANTA FE NEW MEXICAN, Sept. 24, 2006, at A1 (stating some, but not all, IMB sites portray Mexican women as subservient); Who Are These Russian Ladies?, [http://www.russianladies.com/r1\\_learnmore\\_answers.cmf?RequestTimeout=6000&question=whoarethey](http://www.russianladies.com/r1_learnmore_answers.cmf?RequestTimeout=6000&question=whoarethey) (last visited Mar. 3, 2007).

25. Compare the descriptions above with those in Jackson, *supra* note 1, at 494-95.

26. See, e.g., Filipina Bride, <http://www.filipinaheart.com> (last visited Mar. 3, 2007) (“You can find the perfect Filipina friend or Filipino wife from within our extensive database featuring 1000’s of Filipina singles and Filipina personals.... [T]his makes the process of finding that special someone easier than ever.... [T]hey are waiting to meet you!”); Russian Bride, <http://www.goodwife.com/links/directory/18.html> (last visited Mar. 3, 2007) (“We have many sincere women that are looking for a man like you!... We will find a best wife for yourself [sic].... You will be engaged to the Russian woman of your dreams in one year.”).

27. See, e.g., Ferry, *supra* note 24, at A1 (“‘He promised me the moon, the stars,’ Carmen said ruefully. ‘But really what he wanted was a servant.... I came with illusions, but now I don’t think the American dream exists. I ended up working as a maid and taking care of his kids. What kind of a dream is that?’”).

28. CONSTABLE, *supra* note 15, at 130-31.

questionnaires not required of the men. Some IMBs advertise that they conduct criminal background checks of the women before posting their listings. Women agreeing to post their photographs under such circumstances, particularly when the companies are U.S.-based, might reasonably assume that companies conduct similar criminal background checks on male clients. IMBs present images of recruits *en masse*, emphasizing the wide selection of women available; images of the male clients are not similarly available to the women for advance inspection. Male clients generally have much more information about the women than the women have about them.

Many women entering the United States to marry have only met their sponsors in person once or twice and usually have only ninety days to marry or return home.<sup>29</sup> Marriage in such haste and with so many differences to bridge may well bring repentance at higher rates than in other marriages. Immigration attorneys report that they are “frequently consulted by women [who came to the United States through an IMB listing] who are looking to escape from their abusive United States citizen spouse[s].”<sup>30</sup> Immigration laws, although improving significantly in recent years, still create a serious imbalance of power.<sup>31</sup> One scholar, Janet Calvo, argues that immigration sponsorship alone creates a sense of entitlement in the U.S. citizen spouse to define the terms of the marriage.<sup>32</sup> While no reliable data currently exists proving whether physical abuse is more common in marriages resulting from IMB efforts than in other marriages,<sup>33</sup> disparities in age between spouses have been found to correlate with higher rates of domestic homicide,<sup>34</sup> and dependence of one spouse upon the other in matters of daily life (including economic and social dependency as well as dependency with respect to immigration status) “reinforces the likelihood that women will tolerate physical abuse from their husbands.”<sup>35</sup> The periodically-publicized murders of mail-order brides serve as the visible tip of what is reasonably assumed to be a sizeable iceberg of non-fatal abuse.<sup>36</sup>

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29. SARAH B. IGNATIUS ET AL., IMMIGRATION LAW & THE FAMILY sec. 14:13 (Fiancées of U.S. citizens—“Mail-order” brides) (rev. June 2006).

30. *Id.*

31. See generally Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture’s Diminishment, But Not Its Demise*, 24 N. ILL. U. L. REV. 153 (2004).

32. *Id.*

33. Keli Dailey, *I Wish They All Could Be Mail-Order Girls*, SAN ANTONIO CURRENT, July 26, 2006, at 8 (quoting Layli Miller-Muro, executive director of the Tahirih Justice Center, saying that the “FBI doesn’t track [abused or murdered] women by how they met their husbands”).

34. Anderson, *supra* note 22, at 1408 n.47 (citing Margo Wilson & Martin Daly, *Till Death Us Do Part*, in FEMICIDE: THE POLITICS OF WOMAN KILLING 95 (Jill Radford & Diana E.H. Russell eds., 1992)).

35. Debra S. Kalmuss & Murray A. Straus, *Wives Marital Dependency and Wife Abuse*, in PHYSICAL VIOLENCE IN AMERICAN FAMILIES 369, 379 (Murray A. Straus & Richard J. Gelles eds., 1990).

36. For example, Filipina Susana Blackwell was killed in Seattle, Washington in 1995; she was eight months pregnant and killed along with her attorney in the courthouse on the last day of her divorce hearing; Kyrgyzstani Anastasia King was killed in 2000 by her husband, who had a restraining order against him from a previous immigrant wife and was seeking a third wife through a marriage broker when he was finally arrested; Ukrainian Alla Barney was killed in 2003 by her

Marriage brokers' own marketing suggests that the dangers of abuse are well known and that professed ignorance of the obvious risks may be intentional. One IMB reportedly claimed that a "Russian woman will rarely leave a bad (really bad) husband because of the fear that she won't find another one," explaining that "the state and men have been oppressing them [for many years], and they don't think much about themselves."<sup>37</sup> This suggests not only that there are many discontented and vulnerable women from whom to select, but also that bad men (really bad men) can abuse their wives without fearing that they might leave. An advocacy organization, Equality Now, sent e-mails to U.S.-based marriage brokers, purportedly from a doctor who admitted that he had assaulted both of his ex-wives, asking whether this would present a problem in using the IMBs' services. Sixty-one out of sixty-six companies agreed to take him as a client. Only three IMBs declined, although two more expressed serious reservations.<sup>38</sup>

Many practical difficulties confront immigrant women seeking to escape abusive marriages. A husband can terminate a woman's legal status and right to work without notice to her by withdrawing his petition for her legal residence and reporting her to the authorities as undocumented. Women brought to the United States as fiancées who are then abandoned or abused while their ninety-day visas expire have encountered additional obstacles. Finding an attorney to help with orders of protection from domestic violence and immigration assistance is challenging; finding an attorney to take a tort action for an undocumented and presumably impoverished non-English speaker is almost impossible.<sup>39</sup>

One exception was the recent case of *Fox v. Encounters International*, in which a court found an IMB liable for abuse suffered by an immigrant recruit at the hands of her U.S. citizen husband. Nataliya Derkach met and married James Fox after they became members of Encounters International ("EI"), a Maryland-based IMB. EI held itself out as an agency with a ninety-five percent success rate, claiming that the owner—who held herself out as a psychologist—conducted individual interviews with male clients, established personal relationships with each women member, and offered "relationship counseling."<sup>40</sup> Within two months of the marriage, Fox became abusive. After several serious incidents, Derkach went to EI's owner, Natasha Spivack, for help. Spivack minimized the abuse and the danger, and told Derkach that she had only two

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husband. Garin, *supra* note 23, at 69. In another instance, Andrew Gole, 47, confessed to killing Honduran wife Martha Isabel Moncado, 28, in a fit of rage, strangling her in front of their children and then dumping her body parts along a roadway. *Convict L.I. Man in Grisly Wife Slay*, N.Y. DAILY NEWS, May 29, 2004, at 4.

37. Laudan Aron, *Mail-Order Brides*, TULSA WORLD, July 30, 2006, at G3.

38. Garin, *supra* note 23, at 74.

39. In its chapter on "mail order" brides, one manual for immigration practitioners describes immigration remedies, but not family law remedies (protection orders specifying that a spouse must complete the immigration petitioning process are possible in some jurisdictions) or tort actions. IGNATIUS ET AL., *supra* note 29, at sec. 14:13. Although legal services organizations receiving federal funding are granted permission to represent undocumented women in domestic violence proceedings, they do not typically provide representation in tort proceedings.

40. *Fox v. Encounters Int'l*, Nos. 05-1139, 05-1404, 2006 WL 952317, at \*2 (4th Cir. Apr. 13, 2006) (per curiam).



options: stay in the marriage or be deported. Derkach, who was then five months pregnant, stayed, but Fox became more violent. Shortly after the birth of their daughter, he subjected Derkach to severe physical and verbal abuse for two hours, holding her at gunpoint and threatening to kill her. Derkach escaped to a hospital and then went to a battered women's shelter. Fox went to Haiti to get a divorce.<sup>41</sup>

At the shelter, Derkach learned about her right to self-petition for legal residence. She successfully obtained conditional permanent residence in under two months, found employment as a civil engineer, and through the assistance of the Tahiri Justice Center, a non-profit program assisting immigrant women, she found counsel to help her file suit against Fox, EI, and Spivack.<sup>42</sup> Fox settled, agreeing to pay \$115,000 in damages. The case against EI proceeded to a jury under five different state common and statutory law claims: (1) fraud; (2) deceptive and unfair trade practices; (3) unauthorized appropriation of name and likeness;<sup>43</sup> (4) negligence/breach of fiduciary duty; and (5) defamation. Derkach prevailed on each claim and was awarded \$92,000 in compensatory damages and \$341,500 in punitive damages. The appellate court upheld the verdict on appeal.<sup>44</sup>

An IMB's failure to notify a recruit about immigration relief available to domestic violence victims can, in some circumstances, result in civil liability. In *Fox*, the jury and the appellate court found that EI and Spivack had a fiduciary relationship with Derkach based on their knowledge of Derkach's vulnerability as an immigrant. Factors considered included "language barriers, being very far from her friends and family in the Ukraine, and being subject to the complexities of immigration laws," issues common to almost all women marrying through IMBs. EI had also boasted of its expertise in matchmaking, counseling, and immigration matters, and the EI website included a success story about Derkach, describing Spivack as telling her, "Don't worry, you are in the right place to be and I'll take care of you."<sup>45</sup>

When an IMB knows that a particular U.S. client has a history of domestic violence, common knowledge of the vulnerabilities that almost any of its recruits would face in the United States should impose a duty upon the IMB to, at the very least, disclose the relevant facts regarding the history of violence to recruits. The basic ingredients of a fiduciary obligation are present: IMB awareness that recruits are unusually vulnerable and, of necessity, must rely upon IMBs' superior access to information about clients. The IMB is also in the best position to prevent dangerous men from using its services. Although some recruits may know that membership in an IMB does not guarantee that any actual screening has taken place, many women will assume that in a country as rich in technology as the United States, information about individuals' criminal background or

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41. *Id.*

42. Randall K. Miller, with the law firm Arnold & Porter, L.L.P. in Washington, D.C., represented Derkach.

43. EI had posted Derkach's photograph on its website without permission.

44. *Fox*, 2006 WL 952317, at \*2.

45. *Id.* at \*6.

dangerousness would be easily accessible, and that IMBs would provide screening for men similar to that imposed upon the women.

U.S.-based IMBs have also provided convenient cover for criminal organizations. At their least ambitious, criminal organizations can sell U.S. visas obtained through marriage fraud. Sham marriage and fiancée visa schemes can be extraordinarily profitable: law enforcement has recently exposed organized ventures in Washington state (over 130 U.S. citizens involved in bringing fifty to sixty Vietnamese nationals into the U.S. who paid \$20,000 to \$30,000 each for a visa);<sup>46</sup> California (forty-four suspects charged; seventy marriages involved, with over thirty false visa petitions filed for people who paid up to \$60,000 each);<sup>47</sup> and in the national capital region (twenty-two defendants obtained an unknown number of visas, with fees between \$2,500 and \$6,000).<sup>48</sup> As the number of fiancée visas issued each year has skyrocketed from about 6,400 a year in the early 1990s to almost 33,000 in 2005, the potential for fraud has expanded as well.<sup>49</sup>

Some marriage fraud schemes have obviously sinister implications. In April of 2005, the FBI arrested Rafat Mawlawi, a man with dual U.S.-Syrian citizenship, charging him with crimes related to marriage fraud. Between November 2001 and September 2004, Mawlawi arranged at least a dozen false marriages and possessed over twenty passports to Morocco, Syria, Iran, and other countries. Officials indicted ten others; four from Middle Eastern countries and six from Memphis, Tennessee. Causing particular concern in Mawlawi's case was a photograph showing him shouldering a rocket-propelled grenade launcher in Bosnia, sharing the frame with a man connected to al-Qaeda.<sup>50</sup>

### III. CONGRESSIONAL REGULATION OF IMBS

The increased visibility of IMBs on the Internet and media attention to high-profile murders caused advocates for immigrant women, researchers, scholars, and legislators increasing concern.<sup>51</sup> Despite print and television stories highlighting successful marriages, publicity surrounding severe violence and serial homicides raised public awareness of the problem. One well-publicized

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46. *Leaders of Visa Fraud Scheme Sentenced to Three Years in Prison*, U.S. FED. NEWS, June 30, 2006, available at 2006 WLNR 11521471.

47. Press Release, U.S. Immigration & Customs Enforcement, Another Leader of Massive Marriage Fraud Ring Pleads Guilty to Charges Stemming from ICE Investigation (Sept. 20, 2006), <http://www.ice.gov/pi/news/newsreleases/articles/060920santaana.htm>.

48. Press Release, U.S. Immigration & Customs Enforcement, 19 Arrested in Major Marriage and Immigration Fraud Scheme (Sept. 7, 2006), <http://www.ice.gov/pi/news/newsreleases/articles/060907alexandria.htm>.

49. See *infra* text accompanying notes 60-69.

50. *Picture of Guilt?*, MEMPHIS FLYER, July 21, 2005, at 9; John Branstion, *I Love This Country*, MEMPHIS FLYER, July 6, 2006, at 13; Mikhail Tripolsky, *Acceleration of Immigration Process Putting Country Security at Risk*, RUSSIAN BAZAAR, Dec. 15, 2005 (translated by Lucy Gunderson for Voices That Must be Heard), available at <http://www.indypressny.org/article.php3?ArticleID=2420>.

51. See Jackson, *supra* note 1, at 480-81.

story involved a man who locked his Chinese wife in the basement for two years; another man murdered his wife in front of her son and left her body in a dumpster.<sup>52</sup> Feminists and domestic violence advocates argued that the process of paying an agency to select a prospective mate from thousands of purportedly available women created a sense of ownership and entitlement in an ensuing marriage, or perhaps attracted men who were likely to abuse their wives.

After one particularly flagrant murder of an immigrant woman and her attorney in a Washington state courthouse, Senator Herbert Kohl sponsored a bill that in 1996 became the first federal legislation focused upon regulating U.S. international matchmaking organizations.<sup>53</sup> The law required that IMBs<sup>54</sup> provide foreign recruits with written information explaining immigration rights of abused spouses and disclosing that IMBs are unregulated businesses.<sup>55</sup> The government never issued final regulations implementing this section of the law,<sup>56</sup> which was superseded in 2005 by legislation imposing more rigorous requirements upon IMBs.<sup>57</sup>

The law required that the Attorney General conduct a study on IMBs, evaluating the number of marriages resulting in immigration to the United States and any significant nexus with either marriage fraud or domestic violence. The study found little of value;<sup>58</sup> INS forms had never included questions focused on

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52. MILA GLODAVA & RICHARD ONIZUKA, *MAIL-ORDER BRIDES: WOMEN FOR SALE* 62 (1994).

53. Congress debated regulation of “picture bride” marriages in the early 1900s, when the practice of proxy marriages in Japan and Korea led to a rising influx of Asian women, stirring public concern over the women’s purported fertility and the threat to national racial purity. *Id.* at 33-34. In the wake of negative publicity, the Japanese government began denying women passports, and, in 1917, Congress restricted Asian immigration to those marrying U.S. citizens. NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 153-55 (2000). See also Jackson, *supra* note 1, at 484-85, 492-93.

54. IMBs were defined as any business entity offering U.S. citizens or permanent residents access to personal information or photographs about “nonresident noncitizens,” or taking U.S. citizens abroad for “dating, matrimonial, or social referral services.” 8 U.S.C. § 1375(e), (b)(1) (2000) (repealed 2006).

55. See Jackson, *supra* note 1, at 502-16; 8 U.S.C. § 1375(b)(1) (2000) (repealed 2006).

56. Senator Kohl accused the Immigration and Naturalization Service (“INS”) of “dragging its feet” and failing to enforce the rules. Press Release, Senator Herb Kohl, Kohl Urges I.N.S. to Crack Down on ‘Mail-Order Bride’ Industry (Feb. 9, 2001). See also Calvo, *supra* note 31, at 183.

57. The law’s existence did, however, persuade the judge and jury in *Fox v. Encounters Int’l* that the IMB had knowledge of an abused immigrant spouse’s right to self-petition for conditional residence and a duty to disclose this to the plaintiff. Nos. 05-1139, 05-1404, 2006 WL 952317 (4th Cir. Apr. 13, 2006) (per curiam).

58. Critics of efforts to regulate IMBs claim that this study “refuted ... a correlation” between marriage brokers and trafficking of women into the United States. See, e.g., Posting of Dave Root to International Marriage Broker Blog, <http://usaimmigrationattorney.com/nucleus/index.php?itemid=2> (Dec. 4, 2006, 18:57PM). The study was not intended to address IMBs and trafficking; the specific questions to be answered related to rates of marriages attributable to IMBs, marriage fraud and IMB involvement in fraud, and actual and claimed incidents of domestic violence in IMB-orchestrated marriages. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 652(c), 110 Stat. 3009-712 (1996).

IMBs, and the methodology used to estimate the number of IMB-initiated marriages each year was seriously flawed.<sup>59</sup>

The study did bring one interesting fact to light: the annual number of “missing fiancées”—the difference between the number of visas issued to allow immigrants to enter the United States to marry citizens, and the number of adjustments to permanent residence granted on the basis of marriage—has doubled in the past decade.<sup>60</sup> The U.S. government grants fiancée visas “for the purpose of concluding a marriage ... within a 90-day period.”<sup>61</sup> The fiancée visa is not intended to allow U.S. citizens to audition an applicant for a possible marriage; both parties must have a good faith intention to marry at the time the visa is requested. Some IMB customers nevertheless believe that the visa may be used to date multiple women.<sup>62</sup> If the couple does not marry during the ninety-day period, or the U.S. citizen does not file a petition requesting legal residency for his or her spouse, the visa will simply expire, rendering the immigrant spouse undocumented and deportable. If she cannot or does not wish to return home for any reason, she becomes extremely vulnerable to coercion and abuse, with any possible protest silenced by threats of deportation.<sup>63</sup> “Missing” fiancées also include those who deceive a U.S. citizen with promises to marry but disappear once in the country, and people who connive with U.S. citizens or permanent residents to enter the United States through marriage. Missing fiancées, of course, also include those completely innocent of fraud who simply change their minds about marriage.

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59. See Jackson, *supra* note 1, at 502-16.

60. U.S. CITIZENSHIP & IMMIGRATION SERVS., INTERNATIONAL MATCHMAKING ORGANIZATIONS: A REPORT TO CONGRESS 10 (Feb. 1999) [hereinafter IMO REPORT], available at <http://www.uscis.gov/> (follow “About USCIS” hyperlink; then follow “Reports & Studies” hyperlink; then IMO Report hyperlink). This is an approximate measure, as for any particular individual, it is likely that the fiancée visa would be issued in a different year than the adjustment to conditional residence status would be granted.

61. Immigration Law Services, Foreign Affairs Manual, 22 CFR 41.81, Note 1.1 Classification under INA § 101(a)(15)(K)(i) (Nov. 2003).

62. See, e.g., Posting of Jim Peterson to International Marriage Broker Blog, <http://usaimmigrationattorney.com/nucleus/index.php?itemid=2> (Mar. 26, 2006, 14:04:44PM).

[W]e need to have lawsuits against the delaying of visas [by IMBRA] for women who want to come into the USA for three months to date a particular man (live with him and have sex with him or whatever ... it isn't the government's business to stop this or have an opinion).

If a man doesn't want to marry so soon, but rather date 2 dozen beautiful women and live with them all for 3 months here in the USA ... it isn't the right of Congress to block this form of a pursuit of happiness.

*Id.*

63. See generally Anderson, *supra* note 22; Calvo, *supra* note 31. Although the particular legal vulnerabilities described in Anderson's article have been addressed, to some extent, by legislation creating a method of self-petitioning for permanent resident status, as Calvo explains this does not assist women whose fiancée visas expire without marriages taking place; who do not have documentable proof of serious domestic abuse; or who do not learn of their rights or are unable, because of isolation, fear, or lack of legal services, to realize them. Calvo, *supra* note 31, at 200-08.

During the 1980s, about 5,300 fiancée visa petitions were approved each year, while only about 4,200 petitions for permanent resident status for an immigrant spouse were filed.<sup>64</sup> During the early 1990s, however, individuals filed about 6,400 fiancée petitions each year, while the number of permanent resident petitions remained steady. The number of missing fiancées had doubled from 1,100 to 2,200 people per year.<sup>65</sup> The INS noted this change in its 1999 report, speculating only about immigration fraud or domestic abuse. Elsewhere in its study, however, the INS acknowledged that “traffickers have become interested in sending women to the United States because fiancée visas are easily obtained,”<sup>66</sup> without connecting the increased missing fiancées rate to this potential cause. Despite this warning, and the sham fiancée visa schemes described above, the Department of Homeland Security (“DHS”) has significantly increased the number of fiancée visas approved each year. In 1996, DHS approved 9,000 fiancée visas; by 2001, almost 24,000<sup>67</sup>; and in 2005, DHS approved almost 33,000 fiancée visas.<sup>68</sup> The number of missing fiancées again more than doubled, to almost 5,000 per year.<sup>69</sup>

Congress’ next relevant legislative effort, the Trafficking Victims Protection Act of 2000 (“TVPA”),<sup>70</sup> addressed sex trafficking by authorizing funding for anti-trafficking programs in the United States and abroad; requiring the State Department to produce an annual report evaluating countries’ performance on anti-trafficking measures and to link foreign aid to compliance with minimum standards; creating a new federal criminal law focused upon sex trafficking crimes; and broadening trafficking definitions to include trafficking for labor in addition to prostitution-related trafficking.<sup>71</sup> The TVPA also reversed a Supreme Court precedent, *United States v. Kozminski*, which had held that to constitute unlawful involuntary servitude, a defendant must have extracted labor from another through physical force or the threat of physical force; psychological or other types of intimidation or coercion would not suffice.<sup>72</sup> After enactment of the TVPA, criminal coercion now includes, at its lowest threshold, “any scheme,

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64. IMO REPORT, *supra* note 60, at 10.

65. *Id.*

66. *Id.* at 4.

67. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SECURITY, 2005 YEARBOOK OF IMMIGRATION STATISTICS 65 (Nov. 2006), available at [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS\\_2005\\_Yearbook.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS_2005_Yearbook.pdf).

68. *Id.* at 67.

69. *Id.* at 23, 67. This number was derived by comparing the number of spouses who entered as fiancées in 2004 with the number of people adjusting to conditional or permanent residence status in 2005 on the basis of marriage to a U.S. citizen. Some of the missing could be accounted for among the 3,382 immigrants who self-petitioned for adjustment to permanent residence in 2005, as they may have entered the United States with fiancée visas. A self-petitioner must establish a good-faith marriage to a U.S. citizen, and either a divorce occurring before the period of conditional residence expires, or serious physical abuse against the immigrant spouse by the U.S. citizen spouse, in order to obtain legal permanent resident status. *Id.*

70. 22 U.S.C. § 7101 (2000).

71. *Id.*

72. 487 U.S. 931, 944 (1988). For further discussion, see Jackson, *supra* note 1, at 523-29.

plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person.”<sup>73</sup> No more should a person’s apparent ability to escape an oppressor, or the fact that coercion was psychological in nature rather than accomplished by overwhelming physical force, foil a prosecution to protect individuals’ civil rights.

Although focused primarily upon commercial sex trafficking, the TVPA has implications for IMBs as well as for immigrant women brought to the United States as fiancées or spouses who are then exploited or abused. The TVPA created a new federal crime of knowingly profiting from sex trafficking, exposing IMBs acting as fronts for international prostitution rings to increased criminal liability.<sup>74</sup> The new crime of sex trafficking has the potential to reach other IMBs; this, however, will depend on courts’ interpretation of the definition of “commercial sex act.”<sup>75</sup> An IMB commits sex trafficking if it obtains a financial benefit while knowing that a recruit will be coerced or forced to engage in a commercial sex act by force, fraud or coercion.<sup>76</sup> When an IMB is aware that a client intends to bring a particular woman to the United States for purposes of forced or coerced prostitution, but accepts a fee and assists the client, the IMB is guilty of sex trafficking. If an IMB knowingly assists a U.S. client who intends to hold a woman in captivity as his “personal prostitute,”<sup>77</sup> however, the TVPA’s definition of commercial sex—focusing on a particular “sex act, on account of which anything of value is given to or received by any person”<sup>78</sup>—may be too unwieldy.

#### IV. THE INTERNATIONAL MARRIAGE BROKER REGULATION ACT OF 2005

The International Marriage Broker Regulation Act of 2005 (“IMBRA”), which took effect on March 8, 2006, imposes significant new requirements on U.S.-based IMBs and DHS’s administration of the visa process.<sup>79</sup> IMBRA attempts to rectify enormous information inequities inherent to IMB practices, reduce the likelihood that violent criminal offenders will use IMBs, and finally induce IMBs to comply with federal requirements to provide recruits with relevant immigration information. IMBRA limits individuals’ and criminal organizations’

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73. 18 U.S.C. § 1591(c)(2)(B) (2000).

74. *See generally id.*

75. *Id.* § 1591(c)(1).

76. *Id.* § 1591(a)(2).

77. The term “personal child prostitute” was used by a reporter to describe the fifteen-year-old victim of Marvin Hersh, who convinced the boy’s mother to allow him to come to the United States with Hersh by giving her money. Tim Collie & Kevin Krause, *FAU Professor Held Without Bail on Sex Offense*, SUN-SENTINEL (Ft. Lauderdale), Apr. 22, 1997, at A1. *See also* Jackson, *supra* note 1, at 560-63 (describing facts of the case).

78. 18 U.S.C. § 1591(c)(2) (2000).

79. International Marriage Broker Regulation Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006) [hereinafter IMBRA].

opportunities to abuse the fiancée visa process, whether for purposes of human smuggling, sex trafficking, or individual exploitation in servile marriages.<sup>80</sup>

IMBs are defined as any individual, business, or “other legal entity, whether or not organized under any law of the United States, that [1] charges fees for providing dating, matrimonial, matchmaking services, or social referrals”; [2] provides personal information or facilitates communication between U.S. residents<sup>81</sup> and foreign nationals; and [3] is not exempted from coverage.<sup>82</sup> IMBRA exempts not-for-profit, “traditional matchmaking organization[s] of a cultural or religious nature” from its reach, providing they comply with the laws of the United States and any countries in which they operate.<sup>83</sup> IMBRA also exempts entities in which international dating services between the United States and foreign clients are not the principal business, if these services offer U.S. and foreign clients comparable services at comparable rates.<sup>84</sup> As matchmaking services such as eharmony.com and match.com allow any person to participate on the same terms, charge the same rates for women as for men, and do not focus on promotion of international relationships, IMBRA would not apply.

IMBRA subjects IMBs to the following requirements:

- IMBs may not provide personal contact information, photographs or general information about any person under the age of 18<sup>85</sup>
- IMBs must obtain, from each U.S. client, information including:
  - any protection or restraining order issued against him, and the type of relationship between the petitioner in each case and the client<sup>86</sup>
  - any arrest or conviction for violent crime against a person<sup>87</sup>
  - any arrest or conviction for prostitution-related offenses<sup>88</sup>
  - marital history, including current marital status, number of previous marriages, and the date and manner in which each marriage ended<sup>89</sup>
  - any prior visa sponsorship of foreign national(s)<sup>90</sup>

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80. *Id.* § 832(a).

81. This includes both U.S. citizens and lawful permanent residents; both can petition to bring spouses into the country, but only U.S. citizens can petition for a fiancée visa. *Id.* § 833(d)(1).

82. *Id.* § 833(e)(4)(A).

83. *Id.* § 833(e)(4)(B)(i).

84. *Id.* § 833(e)(4)(B)(ii).

85. IMBRA, Pub. L. No. 109-162, § 833(d)(1), 119 Stat. 2960 (2006).

86. *Id.* § 833(d)(2)(B)(i). The type of relationship of the U.S. client to the person obtaining the order will be disclosed to the foreign national, but not the name or address of that person. *Id.* § 833(d)(3)(B).

87. The list includes: “homicide, murder, manslaughter, assault, battery, domestic violence, rape, sexual assault, abusive sexual conduct, sexual exploitation, incest, child abuse or neglect, torture, trafficking, peonage, holding hostage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, or stalking.” *Id.* § 833(d)(2)(B)(ii).

88. The list includes engaging in prostitution; direct or indirect attempt to procure prostitutes or persons for the purpose of prostitution; and receiving proceeds of prostitution. *Id.* § 833(d)(2)(B)(iii).

89. *Id.* § 833(d)(2)(B)(v).

- ages of any minor children<sup>91</sup>
- states and countries in which a client resided during the last twenty years.<sup>92</sup>
- Using the above information, IMBs must conduct a search for the U.S. client in the National Sex Offender Public Registry database, a free, online service, and if the client lived in any non-participating states, the IMB must search relevant state registries as well.<sup>93</sup>
- IMBs must provide a copy of any records retrieved to the foreign national in her primary language (or in English if no translation is available).<sup>94</sup>
- IMBs may not disclose a recruit's personal information to a U.S. client until the recruit has reviewed any records retrieved and has returned a signed document in her primary language (no exceptions) consenting to the release of her information.<sup>95</sup>
- IMBs may not disclose a foreign national's personal information to "any person or entity other than a U.S. client," including clients not in the United States, potential U.S. clients, or other IMBs.<sup>96</sup>

Violation of any of these requirements exposes the IMB to civil penalties of \$5,000 to \$25,000 for each violation.<sup>97</sup>

For U.S. citizens and permanent residents, IMBRA creates lifetime limits upon the ability to obtain fiancée or spousal visas.<sup>98</sup> Petitioners must now wait at least two years between fiancée visa applications; after the second fiancée visa is issued, a petitioner will need to obtain a waiver to secure any additional visas. The government may not grant a waiver to a petitioner with a record of violent criminal offenses against a person except in extraordinary circumstances.<sup>99</sup> If an individual files a third petition within ten years of the first petition's filing, both the petitioner and the beneficiary (recruit) will receive notice of any prior

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90. *Id.*

91. IMBRA, Pub. L. No. 109-162, § 833(d)(2)(B)(vi), 119 Stat. 2960 (2006).

92. *Id.* § 833(d)(2)(B)(vii).

93. *Id.* § 833(d)(3)(A)(i).

94. *Id.* § 833(d)(3)(A)(iii).

95. *Id.* § 833(d)(3)(A)(iv).

96. *Id.* § 833(d)(4).

97. IMBRA, Pub. L. No. 109-162, § 833(d)(5)(A), 119 Stat. 2960 (2006). Violations within the jurisdiction of the special maritime and territorial jurisdiction of the United States, if they affect interstate commerce, are subject to criminal fines and imprisonment for up to five years. *Id.* § 833(d)(5)(B).

98. Fiancée visas are only available to U.S. citizens; permanent residents can only seek visas for spouses. *Id.* § 832(a)(2)(A)-(C).

99. *Id.* § 832(a)(2)(A)-(C). There is a "domestic violence exception" to the two-visa and two-year limitations: a waiver is required if the petitioner had been abused—that is, battered or subjected to extreme cruelty—and (1) was not the primary perpetrator of violence in the relationship as s/he was acting in self-defense; (2) was convicted of violating a protection order intended to protect him/herself; or (3) the crime did not result in serious bodily injury, and a connection existed between the crime and the abuse. *Id.*



petitions approved since 2006.<sup>100</sup> All applicants for fiancée and spousal visas must provide information about any criminal convictions for “specified crimes,” including serious crimes, completed or attempted, against a person, and any convictions relating to a controlled substance or alcohol.

A later-enacted law, the Adam Walsh Child Protection and Safety Act of 2006, imposes additional limits on applicants for fiancée visas. U.S. citizens or permanent residents convicted of a “specified offense against a minor”<sup>101</sup> may not be granted a fiancée visa, absent a waiver that may be granted if the petitioner is found to pose no risk to the beneficiary of the visa.<sup>102</sup>

IMBRA requires that DHS create a database to enforce IMBRA’s limits upon multiple fiancée or spousal visas. DHS must also collect information needed to study IMBRA’s impact on petition and approval rates for fiancée and spousal visas, waivers, repeat petitioners, petitioners with criminal convictions, and IMB compliance with notification requirements.<sup>103</sup> DHS must also develop and distribute a comprehensive pamphlet on “legal rights and resources for immigrant victims of domestic violence,” translated into at least fourteen specified languages.<sup>104</sup> When interviewing foreign nationals hoping to receive a fiancée visa, State Department consular officers must now review orally and provide a copy of the DHS pamphlet, and review any information on the petitioner’s application regarding protection orders or criminal convictions. Officers must also ask whether an IMB “facilitated the relationship” between the petitioner and the applicant. If so, officers must verify that the IMB provided the pamphlet and background information about the applicant as IMBRA requires.<sup>105</sup>

IMBRA explicitly does not preempt state laws regulating the conduct of IMBs, nor alter any state common-law or statutory duties creating alternative rights or remedies for clients or recruits.<sup>106</sup> Missouri, Hawaii, Washington, and Texas already regulate IMBs by requiring them to obtain criminal and marital history from clients and provide recruits with notice that criminal and marital background information are available upon request, providing translated copies of the same if requested.<sup>107</sup> Similar legislation is pending in California.<sup>108</sup>

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100. *Id.* § 832(a)(4).

101. “Specified offenses” are sex-related offenses that include solicitation, pornography, video voyeurism, or kidnapping or false imprisonment.

102. *New Law Creates New Deportable Offense, Bars Certain Sex Offenders From Petitioning for Family-Based Visas*, 83 INTERPRETER RELEASES 1665 (Aug. 7, 2006) (citing Pub. L. No. 109-248 § 402, 120 Stat. 587 (2006); 8 U.S.C.A. § 1154(a)(1) (2006)).

103. IMBRA, Pub. L. No. 109-162, § 833(f), 119 Stat. 2960 (2006).

104. *Id.* § 833(a).

105. *Id.* § 833(b).

106. *Id.* § 833(d)(6).

107. HAW. REV. STAT. §§ 489N-1 to -5 (2006); MO. ANN. STAT. §§ 566.200, .221 (West 2006); TEX. BUS. & COM. CODE ANN. §§ 135.121 to .125 (Vernon 2006); WASH. REV. CODE ANN. §§ 19.220.005, .010 (West 2006).

108. Press Release, Assemblymember Sally Lieber, Senate Committee Approves Protections for “Mail-Order Brides” (June 12, 2006), <http://democrats.assembly.ca.gov/members/a22/Press/p222006019.htm>.

## V. CHALLENGES TO IMBRA

Marriage brokers actively resisted IMBRA as soon as it was introduced, marshaling petitions and complaining that the new background-check requirements imposed on U.S.-based IMBs would only drive customers to non-U.S.-based agencies.<sup>109</sup> One Australian-based IMB owner even speculated that increased use of “offshore operators ... may cause more violence against mail order brides.”<sup>110</sup> This argument implies that U.S.-based agencies are different in some way from those outside the United States, and that the differences result in more safety for their recruits,<sup>111</sup> an unwarranted assumption that, if shared by recruits, could lull them into a false sense of security; precisely the risk that IMBRA’s protections are designed to address.

In early 2006, an IMB (in one case), and an IMB association and an IMB client (in another), filed suit in federal courts in Georgia and Ohio to challenge IMBRA’s constitutionality.<sup>112</sup> In both suits, plaintiffs complained that IMBRA irrationally exempts not-for-profit religious and cultural matchmaking organizations and those dating services not focusing upon international dating as a principal business, violating equal protection guarantees. The suits also challenged IMBRA’s requirement of background searches, disclosures of criminal background information, and written consents from recruits to disclose personal contact information, as a violation of First Amendment free speech protections: an unconstitutional, content-based prior restraint of protected commercial and individual speech. The restrictions on disclosure, plaintiffs argued, were (1) not rationally related to the harms supposedly addressed by IMBRA, (2) not the least restrictive means of advancing the governmental interest involved, and (3) not narrowly tailored as required when placing limits upon speech.

The federal government has defended the suits and in each suit, the courts have granted the Tahirih Justice Center (“TJC”) permission to intervene. Both the federal government and TJC have defended the statute’s constitutionality, describing IMBRA’s purpose as an effort to prevent domestic violence and human trafficking against immigrant women.<sup>113</sup> These statements are accurate but incomplete. IMBRA also targets involuntary servitude, hiding in modern form under cloak of the institution of marriage. Congress aimed IMBRA at men who intend to prostitute women they bring to the United States with a fiancée visa, as well as men who intend to get a domestic servant and “private prostitute” by selecting women particularly vulnerable to coercion and threats of deportation. While the definition of “commercial sex” may exclude the latter as

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109. See, e.g., Press Release, Russian Brides Cyber Guide, *supra* note 1.

110. *Id.*

111. *Id.*

112. *European Connections & Tours, Inc. v. Gonzalez*, No. 1:06-CV-0426-CC (N.D. Ga. Mar. 7, 2006); *Am. Online Dating Ass’n v. Gonzalez*, No. 3:06-CV-123 (S.D. Ohio May 25, 2006).

113. See, e.g., Proposed Findings of Fact and Conclusions of Law as Intervenor Tahirih Justice Center, *European Connections & Tours, Inc. v. Gonzalez*, No. 1:06-CV-0426-CC (N.D. Ga. Apr. 24, 2006).

an instance of human trafficking, it represents a vestige of slavery: involuntary domestic servitude, facilitated by international matchmaking agencies, papered over by the contract of marriage. IMBRA is justified by Congress' authority under the Thirteenth Amendment.

#### VI. WOMEN'S EXPERIENCES OF SLAVERY IN THE UNITED STATES

When they told me my new-born babe was a girl, my heart was heavier than it had ever been before. Slavery is terrible for men; but it is far more terrible for women. Superadded to the burden common to all, they have wrongs, and sufferings, and mortifications peculiarly their own.<sup>114</sup>

Enslaved women, whether African or Native American, or even white women held in indentured servitude, endured particular and distinct trials. From the earliest days of slavery in what would become the United States, women provided not only conventional, commercially-productive labor, but also domestic and sexual services.<sup>115</sup> Targets for sexual exploitation of all kinds, enslaved and indentured women and girls were almost routinely forced and coerced into unwanted sex with white male owners and others. Importation of new slaves was prohibited in 1807, and owners as a result focused more intently upon enslaved women's fertility. Advertisements for the sale of young women emphasized their childbearing prowess,<sup>116</sup> and some enslaved women were repeatedly impregnated, either by white masters or their family members, overseers and drivers, or by enslaved men: as historian Robert Shaw noted, "there have been recorded a fair number of complaints on the part of slave women over being forced to take undesired partners into their beds."<sup>117</sup> In 1822, at the age of forty-two, one enslaved woman was reportedly pregnant with her forty-second child.<sup>118</sup> Frederick Douglass (who himself suspected that his master was also his father),<sup>119</sup> describes another woman who was chained to an enslaved man, a married man hired from a different master for the purpose, every night until she became pregnant.<sup>120</sup> Although enslaved men and women were both forced to have sex for purposes of creating a new slave labor force, only females endured pregnancy and the dangers of childbirth as a result. Women were also required to perform personal services not asked of men, including serving as a

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114. HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL 207 (1982) (footnote omitted).

115. See Neal Kumar Katyal, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791, 793-806 (1993) (defining forced prostitution as a form of slavery and providing background of slavery in America).

116. See, e.g., William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1755-56 (1996).

117. ROBERT B. SHAW, A LEGAL HISTORY OF SLAVERY 44 (1991).

118. *Id.* at 43-44 (citing ULRICH B. PHILLIPS, AMERICAN NEGRO SLAVERY 299 (1918), describing an article in the *Lynchburg Press*).

119. FREDERICK DOUGLASS, THE NARRATIVE AND SELECTED WRITINGS 18 (Michael Meyer ed., 1984).

120. *Id.* at 67.

wet nurse for infants, even at the expense of their own infant children.<sup>121</sup> Enslaved women also provided domestic services for other enslaved people, possibly including male companions, chosen or not, or children, their own or not.

Centuries earlier, Native American women and girls had also been enslaved. In New England, war with the Pequot tribes in 1637 led to the capture of about 250 women and children, who were distributed to individual soldiers and townships as slaves.<sup>122</sup> Forty years later, King Philip's War led to the capture of over 1,000 Native Americans. The New Englanders traded the men for African slaves, keeping the women and children as domestic indentured servants and slaves.<sup>123</sup> By 1708, the French settlement in Louisiana held 279 people, eighty of whom—primarily Native American girls—were enslaved. Shaw deduces that “clearly, a substantial number of these slaves were actually serving as concubines in the colony, which included only 28 white women.”<sup>124</sup> In the late 1700s, white miners in Oregon enslaved Native American women and children, “forcing young girls into prostitution or selling them outright to the highest bidder.”<sup>125</sup>

Slave owners also sold African women and girls into prostitution, sometimes in organized “fancy girl” markets, sometimes informally. Attractive women could bring significantly higher prices than the norm—up to \$5,000, compared to \$1,500 for a field hand—reflecting the greater profits they could bring to owners. As a result, traders monitored incoming slave ships for marketable women, taking them to auction, and selling them to brothels and to individual men who could use them in prostitution without need of a farm or plantation.<sup>126</sup> A shotgun shack would suffice, with a woman standing at the front stoop to attract passers-by, her owner nearby, ready to collect his profits and protect his investment against either harm or help.<sup>127</sup> The practice cast a shadow over all enslaved women. Although Harriet Jacobs considered herself to have been “kindly treated” as compared to other slaves,<sup>128</sup> her last owner tried to coerce her into sexual submission by insinuating that he would sell her daughter into prostitution: “Your boy shall be put to work, and he shall soon be sold; and your girl shall be raised for the purpose of selling well.”<sup>129</sup>

Women prostituted by small-time owners undoubtedly provided other services as well. Consider the following scenario: a single white man, living in the South in a small house, owns one African woman whom he prostitutes for his income.

121. See, e.g., *id.* at 127.

122. SHAW, *supra* note 117, at 66. About 700 men were killed; most of the boys were sent to the West Indies as slaves. *Id.*

123. *Id.* at 66.

124. *Id.* at 7.

125. EXTERMINATE THEM! 113 (Clifford E. Trafzer & Joel R. Hyer eds., 1999).

126. TERESA AMOTT & JULIE MATTHAEI, RACE, GENDER AND WORK 147 (rev. ed. 1996); KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 196 (1956); DEBORAH GRAY WHITE, AR’N’T I A WOMAN? FEMALE SLAVES IN THE PLANTATION SOUTH 196 (1985).

127. Katyal, *supra* note 115, at 799.

128. JACOBS, *supra* note 114, at 251.

129. *Id.* at 215. See also *id.* at 153, 178, 204.

Now try to imagine that he does all the domestic chores, for both of them. This improbable scenario illustrates the obvious: cooking, washing, mending clothes, sweeping, scrubbing dishes; all these tasks must have fallen to enslaved women, who were subjected to both the sexual and domestic demands of their owners and others.

Owners<sup>130</sup> of white women serving out periods of indenture often punished them for sexual activity.<sup>131</sup> In some states, if a master caused a white servant's pregnancy, he could extend her period of indenture for one to three years. Recognizing that this rule caused obvious perverse incentives (but ignoring the possibility of collusion among slave owners), a North Carolina law provided that women would serve this extended indenture under different masters.<sup>132</sup> A Maryland law provided that any white woman who married an enslaved man would herself be enslaved during his lifetime, together with all their children, following the condition of the father.<sup>133</sup> The legislature repealed the law "because of some evidence that masters were pressuring white servant women into marriage with slaves to enjoy the increase in their slave progeny."<sup>134</sup> As enslaved and indentured servants could be sold at any time to another master as punishment for failure to submit to sexual demands, at the request of an offended or jealous wife, at the death of the current master, or because of his bankruptcy, the legislature could never fully eliminate the risk of sexual exploitation.

Enslaved women who were prostituted to the public were also required to do domestic chores. Owners also forced and coerced enslaved women primarily used in domestic service or as field workers into sexual service. Owners and drivers raped and forcibly bred enslaved women, brutally punishing them for daring to consider sexual relationships of their own choosing. Enslaved women provided almost all domestic services for owners, for enslaved men, and for their own and other children, including making, repairing, and cleaning clothes and bedding, and preparing and storing food. Owners coerced female indentured servants to have sex, punished them when they became pregnant, and tricked or forced them to bear children into indentured servitude until adulthood, or even into lifelong slavery.<sup>135</sup> These particular burdens of slavery, consistent across diverse contexts, fell uniquely upon women.<sup>136</sup>

Forced and coerced sexual and domestic services are intrinsic to women's experience of slavery.<sup>137</sup> Failure to acknowledge and punish these practices as

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130. Although indentured servants were technically not slaves, the right to their services was bought and sold. SHAW, *supra* note 117, at 3.

131. *Id.* at 25.

132. *Id.*

133. *Id.* at 47. This rule, originally the common law in England, was not followed by any other colony. *Id.* at 61 n.1.

134. *Id.* at 47-48.

135. *Id.* at 34-35.

136. See generally Pamela D. Bridgewater, *Un/Re/Discovering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 WASH. & LEE RACE & ETHNIC ANCESTRY L.J. 11 (2001).

137. Pamela D. Bridgewater, *Ain't I a Slave: Slavery, Reproductive Abuse, and Reparations*, 14 UCLA WOMEN'S L.J. 89, 113-25 (2005).

modern forms of involuntary servitude when they occur within the domestic sphere leaves women and girls enslaved through marriage (or deceptive enticements to marry) without the protections provided by the Thirteenth Amendment, and thus without equal protection of the federal criminal laws against slavery and involuntary servitude.

## VII. MARRIAGE AND DOMESTIC SERVITUDE

Just as a diversity of relationships can result from the interventions of IMBs, master-slave relationships in the antebellum South varied widely in character. Historian Viviana Zelizer describes the relationship between Samuel Miller, a white man living in Louisiana, and Patsy, “his mulatto slave and sexual partner,” which came to the attention of the Supreme Court of Louisiana in 1847.<sup>138</sup> Samuel and Patsy lived together on his plantation, and trusted friends knew of their relationship. Samuel arranged for Patsy’s emancipation in 1844 while making valiant efforts, despite his serious illness, to free her and provide for her future financial security, even at the expense (initially, at least) of his other heirs.<sup>139</sup> According to Shaw, this practice was not uncommon:

[C]lear tangible evidence, in the form of wills and other documents, shows that many slave owners did recognize familial if illegitimate relationships with slaves and sought to give them freedom along with, very often, other property or benefits. For evident reasons, no even approximate estimate of the number or frequency of sexual liaisons between slave owners and slaves can be made, but it is obvious that such relationships, although always concealed and condemned by polite society, were commonplace.<sup>140</sup>

Slavery could conceal affectionate sexual relationships, even though they could not be sanctified by marriage. Virginia’s state legislature, for example, kept a law against miscegenation in place for almost three centuries until the Supreme Court finally ruled it unconstitutional in 1967.<sup>141</sup>

If slavery could conceal a relationship that, under other circumstances, would have been recognized as a marriage, could marriage conceal a relationship that

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138. VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY* 7 (2005).

139. *Id.* at 7-9. Manumission was a challenging feat: every state imposed severe restrictions upon it, often requiring the newly-freed person to leave the state as a condition of obtaining or retaining freedom. SHAW, *supra* note 117, at 79. In Patsy and Samuel’s case, the Louisiana Supreme Court reversed a jury verdict that had upheld the transfer of promissory notes to Patsy, holding that the critical moment was Samuel’s transfer of the notes to an agent to keep for Patsy’s benefit—at which time she was determined to be a slave, incapable of receiving gifts—rather than the moment Samuel himself gave the notes to Patsy, after she had been emancipated. ZELIZER, *supra* note 138, at 7-9.

140. SHAW, *supra* note 117, at 78. See also Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 221 (1999) (“[P]rivate law may play at least as significant a role as public law in construction, recognition, and reinforcement of racial and sexual relationships.”).

141. Wiecek, *supra* note 116, at 1757 (discussing *Loving v. Virginia*, 388 U.S. 1 (1967)).

could be recognized, as a legal matter, as slavery? The common law of marriage certainly reflects some of the legal incidents of slavery. Roman law, which greatly influenced English common law, accorded a wife the same legal status as her children: she was the property of her husband, who held the power to end her life.<sup>142</sup> English common law of marriage employed first a chattel theory, in which marriage transferred a father's property rights in his daughter to her husband, and then a coverture theory, in which a woman's legal identity, upon marriage, "merged with" (disappeared under) her husband's.<sup>143</sup> In both theories, husbands had almost complete authority over wives' properties and persons. A wife had no legal identity, little or no control over property held in her name, and no capacity to contract.<sup>144</sup> Husbands enjoyed the right to physically chastise wives, and although courts paid lip service to limits upon that right, their refusal to intervene "to prevent the deplorable spectacle of the exhibition of similar cases in our courts of justice"<sup>145</sup> meant that the right of chastisement, even after it began to erode in the 1860s as a legal matter,<sup>146</sup> knew no meaningful limits. Husbands possessed rights to the products of their wives' labor, and to confine their wives and determine their legal residence, meaning that a man could prevent his wife from leaving home to escape abuse or oppression.<sup>147</sup> Marital rape was, as a practical matter, an oxymoron, as it was a complete defense to a charge of rape that the defendant was married to the complainant. Wives were thus required to provide sexual access on demand.<sup>148</sup>

Husbands wielded such comprehensive legal authority over wives, and subjected wives to such severe physical violence in some cases, that early nineteenth-century feminists likened the institution of marriage to the institution of slavery.<sup>149</sup> This rhetorical movement gained some popular currency at the time, eroding the doctrine of chastisement<sup>150</sup> and advancing measures to allow women to vote, but was later reviled as a racist attempt to equate the obstacles faced by white married women—most of whom were not abused, and some of

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142. Cheryl Ward Smith, "The Rule of Thumb," *A Historic Perspective?*, reprinted in DOMESTIC VIOLENCE LAW 1-2 (Nancy K.D. Lemon ed., 2d ed. 2001).

143. See, e.g., *Poor v. Poor*, 8 N.H. 307, 313, 316 (1836) (representing a transition from coverture to an acknowledgement of limits upon the right of chastisement, but refusing to intervene unless a husband is exercising "harsh and cruel tyranny" that is caused by the wife's provocation).

144. *Id.* at 314-15.

145. *Bradley v. State*, 1 Miss. (1 Walker) 156, 158 (1824).

146. See, e.g., *State v. Rhodes*, 61 N.C. 453, 454-55 (1868).

147. *Poor*, 8 N.H. at 320 (denying divorce while cautioning husband to control his temper so his wife's provocation does not again drive him to violence).

148. *State v. Smith*, 426 A.2d 38, 44-45, 47 (N.J. 1981) (describing English common law as "implied matrimonial consent to intercourse which the wife could not retract," discussing right to confine wife, ruling that by 1975 wives were allow to revoke implied consent to sex "even prior to a formal judicial order of separation").

149. See Sally F. Goldfarb, "No Civilized System of Justice": *The Fate of the Violence Against Women Act*, 102 W. VA. L. REV. 499, 531 (2000).

150. In both *Rhodes*, 61 N.C. at 453-54, and *Fulgham v. State*, 46 Ala. 143, 147 (1871), the courts specifically assert that a wife is not the slave of her husband, acknowledging the rhetoric of the time.

whom enjoyed benefits of ownership over enslaved Africans—with the plight of people who had been abducted, forcibly bred, bought and sold like livestock, abused, and degraded.<sup>151</sup>

“In traditional legal analysis, slavery *was* a domestic relation.”<sup>152</sup> During congressional debates over the Thirteenth Amendment, southerners in both the House and the Senate raised the terrifying specter that abolishing involuntary servitude would also abolish patriarchal family rights, cast as property rights.<sup>153</sup>

A husband has a right of property in the service of his wife; he has the right to the management of his household affairs ... [which] rest[s] upon the same basis as a man’s right of property in the service of slaves. The relation is clearly and distinctly defined by the law, and as clearly and distinctly recognized by the Constitution of the United States.<sup>154</sup>

Senator Edgar Cowen argued in opposition to the Thirteenth Amendment that marriage vests husbands with property rights. Cowen argued that “the *quasi* servitude which the wife to some extent owes to her husband” could not be abridged without due process of law.<sup>155</sup> Once states ratified the Amendment, however, Cowan mocked its application to family relations:

Was [involuntary servitude] the service that was due from the minor to his parent? Was it the right the husband had to the services of his wife? Nobody can pretend that those things were within the purview of that amendment; nobody believes it. It was mentioned as a matter of ridicule, in some places ... but that was false.<sup>156</sup>

While many Thirteenth Amendment scholars concur that legislators supporting the Amendment did not seriously intend to free women from the multiple legal disadvantages of matrimony, the analysis need not end with this conclusion. Congress used broad and mandatory language, and intended the Thirteenth Amendment to prohibit slavery and involuntary servitude against groups other

151. See Goldfarb, *supra* note 149, at 531-32 & n.265 (citing ANGELA Y. DAVIS, *WOMEN, RACE & CLASS* 70-86 (1981)). But see *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (“[T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes.”).

152. Goldfarb, *supra* note 147, at 528 (citing Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL’Y 465, 466 (1995)). See also Amy Dru Stanley, *Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation*, 75 J. AM. HIST. 471, 477 (1988) (“[M]aster and slave and husband and wife ... parallel parts of the law of domestic relations.”).

153. See generally Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207 (1992).

154. VanderVelde, *supra* note 4, at 454-55 (quoting CONG. GLOBE, 38th Cong., 2d Sess. 215 (1865) (remarks of Rep. Chilton White)). See also *id.* at 455 n.88 (citing CONG. GLOBE, 38th Cong., 1st Sess. 2941 (1864) (remarks of Rep. F. Wood, N.Y.) (“The affections of a man’s wife and children are among the dearest of his possessions ....”)).

155. *Id.* at 456-57 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 96 (1865) (remarks of Sen. Edgar Cowan)). See also MICHAEL VORENBERG, *FINAL FREEDOM* 55-56 (Christopher Tomlins ed., 2001).

156. VanderVelde, *supra* note 4, at 457 n.93 (quoting remarks of Sen. Edgar Cowan).



than Africans. Congress also intended to prohibit slavery and involuntary servitude perpetrated by private individuals against other private individuals.<sup>157</sup> The Thirteenth Amendment authorizes, and in a real sense *requires*, that Congress provide lawful redress for actions by private individuals resulting in slavery or involuntary servitude. It grants Congress continued authority to create new legislation in service to its ends: a nod to the eternal vigilance required to protect those vulnerable, whether because of poverty, disadvantaged social status, or for other reasons, from severe exploitation by others. If “the poor will always be with us,” so too will be people plotting to take full advantage of them, providing for short-term necessities in uneven exchanges for long-term freedoms. While the Thirteenth Amendment names the prohibited ends, it establishes an ongoing duty of vigilance, with the particular means left for Congress to determine in future legislation.

Scholars have advocated for basic Thirteenth Amendment protections in the context of abusive marriages for many years.<sup>158</sup> Joyce McConnell, in an article published in 1992, describes severe conditions endured by battered women and demonstrates persuasively how they meet the legal definition of involuntary servitude.<sup>159</sup> She argues that “[e]mbodied in the definition of battering is the concept that the batterer is acting violently not out of rage,” but with the intent to coerce his victim to bend to his will, irrespective of hers.<sup>160</sup> Not all domestic violence rises to the level of battering, or constitutes criminal involuntary servitude, a civil rights violation.<sup>161</sup> “Domestic violence” generally includes any criminal assault, including a threat, committed against someone with whom one has an intimate or familial (domestic) relationship. One may use the term as shorthand to describe what a “typical battered woman” faces, but this elides the distinction between one act of violence against an intimate and the series of events or more serious violence involved when a woman is battered. To commit the crime of holding a person in involuntary servitude, an individual must have

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157. See, e.g., *Pierce v. United States*, 146 F.2d 84, 84-86 (5th Cir. 1944); *Bernal v. United States*, 241 F. 339, 341-42 (5th Cir. 1917).

158. See, e.g., McConnell, *supra* note 153, at 215-20, 239-43. See also Vanessa B.M. Vergara, *Abusive Mail-Order Bride Marriage and the Thirteenth Amendment*, 94 NW. U.L. REV. 1547, 1568-93 (2000).

159. McConnell, *supra* note 153, at 239-43.

160. *Id.* at 230.

161. Nor is all domestic violence, even if we consider only instances of domestic violence by men against women, necessarily gender-based violence. Confounding these distinct categories helped to sink the Violence Against Women Act’s (“VAWA”) federal civil remedy for gender-based crimes under its own weight. Proponents attempted to shore up congressional legislative authority under the Commerce Clause by describing the severe economic effects that the widespread social problem of domestic violence against women creates. The enormity of the problem as defined exacerbated predictable judicial fears—founded on illegitimate prejudices as well as legitimate concerns—that the federal courts would soon be overwhelmed by VAWA claims relating to domestic violence. A finer-grained analysis defining the subset of domestic violence incidents against women that would be considered “gender-based” will be needed to establish such a federal tort.

the intention to extract labor or services, not just to place someone in fear, cause harm, or vent one's rage.<sup>162</sup>

Consider a man, otherwise not violent or abusive, who gets drunk every payday, comes home, and puts his fist through the wall to frighten his wife into leaving him alone so he can sleep it off. This is an assault of the "intent-to-frighten" variety, and should be considered domestic violence, but without more facts showing an intent to extract domestic services, sexual services, or labor, it does not constitute involuntary servitude: the act violates her rights, but not necessarily her civil rights. Contrast this with the case of a man who demands exactitude in his wife's performance of household affairs and sex at a time of his choosing, regardless of his wife's inclinations, and who makes specific, detailed, and terrifying threats about what will happen to her should she leave. This man uses threats and forced or coerced sex to prevent his wife from escaping, at least in part so that he will continue receiving domestic and sexual services.<sup>163</sup> His wife is battered and has also been placed in a condition of involuntary servitude. While the first man may also intend to keep his wife in silent subjection, and she may well provide domestic and sexual services, without more facts it is difficult to argue that his conduct is intended to extract services.<sup>164</sup>

Proving criminal involuntary servitude also requires a showing that a perpetrator kept his victim in objective conditions of degradation: "an individual exercising her free will would simply not have countenanced such treatment."<sup>165</sup> This does not, however, require a showing of abject impoverishment, squalor, complete submission to another's will at all times, or all-consuming fear for one's life. Objective indicia of degradation can be more nuanced than these extremes. In her lawsuit, Derkach complained that Fox had tried to make her drink from a glass he had spit in. Although the record gives insufficient detail to discern whether this act was a complaint about "the service"—her preparation of his food—this was an attempt to degrade her. Degradation can come in myriad forms that courts should evaluate in context.<sup>166</sup>

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162. See McConnell, *supra* note 153, at 234-40, 252 (arguing that instances of domestic violence constitute involuntary servitude; giving examples of domestic violence involving forced prostitution and coerced sexual services; and emphasizing the need for a pattern of coercive activity to constitute involuntary servitude).

163. The "services provided" element could even contemplate simple companionship, so that violence inspired by fear of abandonment can be understood as compelling companionate services against another's will. "Escort" services are available in the market for a price, sometimes serving as a cover for prostitution; companionate services should be understood as a form of labor.

164. See Angie Perone, *Unchain My Heart: Slavery as a Defense to the Dismantling of the Violence Against Women Act*, 17 HASTINGS WOMEN'S L.J. 115, 135-39 (2006).

165. Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1668 (2001).

166. Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 671 (2005) ("The struggle for racial justice in America ... is perhaps best understood as a struggle to secure dignity in the face of sustained efforts to degrade and dishonor persons on the basis of color. The concepts of dignity and subordination are powerfully linked."). Male privilege can expand the dignitary interests protected by the Thirteenth Amendment beyond recognition. For example, in *Severs v. Severs*, a divorce action in which the wife claimed a share in her husband's future earnings because she supported him so that he could obtain a license to practice law, the court held

## VIII. CONCLUSION

The Thirteenth Amendment provides broad authority for Congress to prevent and eliminate slavery and involuntary servitude, in whatever contexts they may arise. As institutions of slavery and involuntary servitude encompassed, and still encompass, different forms of oppression for women than for men, indifference to these distinctions can operate to deny women equal protection of the federal criminal laws enforcing the Thirteenth Amendment; equal protection that is guaranteed by the Fifth Amendment.<sup>167</sup> Modern federal prosecutors reviewing allegations of criminal involuntary servitude must not fail to prosecute those cases because they occur in the domestic sphere, under cover of marriage, by dismissing them as merely “domestic violence.”

Turning back to IMBRA, the evidence before Congress included histories of women brought over to the United States through the interventions of IMBs, who were then abused and killed or treated as if they were disposable or fungible. Their husbands acted as if they had the right to punish physically and even to kill if they wished, enjoying the power over life and death. The evidence also included information about IMBs and individuals using IMBs who were involved in trafficking of women into prostitution. Although the IMBs have argued in court pleadings that no proof exists that the rate of domestic homicide is greater in the marriages they broker than in marriages between U.S. citizens, this is attributable to a lack of sufficiently precise data on IMBs rather than to any showing that IMB-arranged marriages are as safe or safer than domestic marriages: the IMBs have no proof in their favor either.<sup>168</sup>

Immigrant women are, as a group, more vulnerable to domestic abuse and exploitation rising to the level of involuntary servitude than U.S. citizens. The road to marriage paved by immigration law and IMBs is short, narrow, and precarious. Short, as expectations of instant happiness dovetail with tight immigration deadlines for decision-making. Narrow, as when at least 100 women recruits appear to be available for every male client of an IMB, an individual woman may believe that she has only one viable prospect for marriage

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that her claim “would transmute the bonds of marriage into the bonds of involuntary servitude contrary to Amendment XIII of the United States Constitution.” 426 So. 2d 992, 994 (Fla. Dist. Ct. App. 1983).

167. See generally Eugene Doherty, *Equal Protection under the Fifth and Fourteenth Amendments: Patterns of Congruence, Divergence and Judicial Deference*, 16 OHIO N.U. L. REV. 591 (1989).

168. See, e.g., *Trafficking of Women and Children in East Asia and Beyond: A Review of U.S. Policy: Hearing Before Subcomm. E. Asian & Pac. Affairs of S. Comm. on Foreign Relations*, 108th Cong. (2003), available at <http://foreign.senate.gov/testimony/2003/HughesTestimony030409.pdf> (testimony of Donna Hughes, Professor of Women’s Studies, Univ. of R.I.); *Trafficking: Mail Order Bride Abuses: Hearing Before Subcomm. E. Asian & Pac. Affairs of S. Comm. on Foreign Relations*, 108th Cong. (2004), available at <http://foreign.senate.gov/testimony/2004/JacksonTestimony040713.pdf> (testimony of Suzanne Jackson, Associate Professor, George Washington Law School); *Trafficking: Mail Order Bride Abuses: Hearing Before Subcomm. E. Asian & Pac. Affairs of S. Comm. on Foreign Relations*, 108th Cong. (2004), available at <http://foreign.senate.gov/testimony/2004/ClarkTestimony040713.pdf> (testimony of Michele Clark, Co-Director, The Protection Project).

before she is considered too old. Precarious, as falling off the path to happy-ever-after marriage can lead to complete destruction.

Although there are success stories from among these relationships, Congress has ample cause to legislate in this area. Deterring people with a history of involvement in prostitution, domestic assault, or sexual offenses from using IMBs deprives them of the apparent legitimacy the brokers confer, and of access to the women the IMBs have recruited through advertising efforts and personal recruiting abroad.

Approximately one year after IMBRA took effect, the Atlanta federal court issued an opinion upholding its constitutionality,<sup>169</sup> and the plaintiffs in the Ohio case withdrew their complaint.<sup>170</sup> District Judge Clarence Cooper's opinion noted severe violence directed against "mail-order brides" in states across the United States, and high rates of domestic violence against immigrant women, as well as the "estimated 70% of abusive U.S. citizen spouses, including those who consummate relationships through IMBs, [who] withhold the filing of the proper paperwork necessary to validate the legal status of their immigrant female partners ... to hold the threat of jail or deportation over the woman."<sup>171</sup> Judge Cooper found that Congress intended IMBRA to improve the safety of immigrant women using IMBs by preventing both domestic violence and human trafficking. His opinion goes further, however, to describe congressional findings in an earlier version of the legislation that became IMBRA, that immigrants entering the United States with fiancée visas "are unaware of United States laws regarding ... prohibitions on involuntary servitude."<sup>172</sup>

Judge Cooper found that the IMB plaintiff had failed to show any First Amendment injury: IMBRA did not restrict any commercial speech, but instead affected "a part of a commercial transaction that does not involve any advertising or commercial claims," the disclosure of women's personal contact information.<sup>173</sup> Judge Cooper found IMBRA's exemption of non-profit, religious and cultural organizations, and those not focused on international relationships, to be distinctions with rational bases. For-profit companies focused on international relationships, which provide different services to men as opposed to women, have powerful incentives "skewed to disregard women's safety."<sup>174</sup>

IMBRA may drive some IMBs out of business, just as the IMBs have claimed. But requiring IMBs to take more responsibility to ensure that men with a history of criminal violence against others cannot use their services to gain access to unsuspecting women places minimal burdens on IMBs, while reducing significant risks facing immigrant women. IMBRA will also help those IMB clients without a criminal history, who will now benefit from a legitimate expectation that IMB clients have been screened for dangerousness, at least in

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169. *European Connections & Tours, Inc. v. Gonzalez*, No. 1:06-CV-0426-CC, 2007 U.S. Dist. LEXIS 22823 (N.D. Ga. Mar. 23, 2007).

170. E-mail from Randall Miller, Esq. (Mar. 23, 2007) (copy on file with author).

171. *European Connections & Tours*, 2007 U.S. Dist. LEXIS 22823, at \*11.

172. *Id.* at \*28.

173. *Id.* at \*40.

174. *Id.* at \*62.

some minimal way. The shady reputation of the IMB industry should also improve, as rogue IMBs will be deterred by civil penalties from disregarding their recruits' safety, and the horrific abuses impelling enactment of IMBRA, the domestic violence, murders, and instances of involuntary servitude, should no longer be so common.

Federal prosecutors should still be vigilant in examining cases of severe domestic abuse for evidence of crimes of slavery and involuntary servitude, and prosecuting these crimes regardless of their context in the private, rather than the public sphere. As a policy or practice of ignoring this category of involuntary servitude cases particularly harms women, it arguably deprives women of the equal protection of the federal criminal laws effectuating the Thirteenth Amendment. "[P]rosecutorial discretion 'is broad, [but] it is not 'unfettered,'"<sup>175</sup> and must not be "deliberately based upon an unjustifiable standard."<sup>176</sup> Although proving an equal protection violation requires a showing that the discriminatory result is an intended effect of the policy challenged, a very high burden, unjustified persistence in applying a particular standard despite awareness of its discriminatory impact may, in some cases, raise an inference that the discrimination is indeed intentional.<sup>177</sup>

One caveat is essential. Oft-heard rhetoric about inherently dangerous "mail-order marriages," desperate immigrant women victims and predatory men should not be fueled to extremes by anti-immigrant fears periodically riddling contemporary culture. Although not quite as ancient as oppression of women in marriage, racism, fears of lost racial purity, and anti-miscegenation laws have a history in the United States just as long and just as stubborn as that of slavery.<sup>178</sup> We must simultaneously embrace our rich diversity, while staying vigilantly protective of the welfare—and civil rights—of the least powerful among us.

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175. *Wayte v. United States*, 470 U.S. 598, 608 (1985) (citations omitted).

176. *Id.* (citations omitted).

177. *Washington v. Davis*, 426 U.S. 229, 242 (1976).

178. See RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 61-68 (2001); PETER WALLENSTEIN, *TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE AND LAW—AN AMERICAN HISTORY* 173-86 (2002).